



April 11, 2000

Mr. Sullivan H. Bradley, Jr.  
Assistant District Attorney  
County of Tarrant  
1025 South Jennings, Suite 300  
Fort Worth, Texas 76104

OR2000-1428

Dear Mr. Bradley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133964.

The Tarrant County Hospital District (the "district") received a request for information regarding the district's relationship with Group Purchasing Organizations ("GPOs").<sup>1</sup> You

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<sup>1</sup>Specifically, the requestor requests the following five categories of information:

- 1) All contracts, letter agreements and other documents constituting contractual agreements with any [GPO] as defined by Title 42, U.S. Code ann., sec. 1001.952, for the purchase of needle products . . . in force . . . at any time during the period January 1, 1998, to the present[;]
- 2) All documents constituting written agreements not encompassed in No. 1 above between the GPO and John Peter Smith Hospital for which items or services are furnished by the GPO, as defined by 42 U.S.C.A. 1001.952, . . . in force . . . at any time during the period January 1, 1998, to the present[;]
- 3) All documents constituting written disclosures by any GPO to John Peter Smith Hospital the amount received from each vendor with respect to purchases made by or on behalf of San Francisco General Hospital, as required by 42 U.S.C.A. 1001.952, since January 1, 1998[;]
- 4) All documents constituting payments of any kind . . . paid by any GPO to John Peter Smith for any purchases of needle products, which may be exempted from anti-kickback and self-referral provisions of federal or state laws under provisions of 42 U.S.C.A. 1001.952, since January 1, 1998[; and]
- 5) That portion of John Peter Smith Hospital policies and procedures requiring compliance with federal and state anti-kickback statutes, requiring that all of the hospital's contracts and arrangements with referral sources comply with all applicable statutes and regulations and clarifying those payment practices that would be immune from prosecution under the anti-kickback statute, 42 C.F.R. 1001.952[.]

state that the district does not have documents responsive to categories three and four of the request. You further state that you have released documents responsive to category five, as well as some of the documents responsive to categories one and two of the request. You argue that the remaining responsive documents contain proprietary information that is excepted from public disclosure under section 552.110 of the Government Code. We have considered the claimed exception and have reviewed the submitted sample of information.<sup>2</sup>

Pursuant to section 552.305 of the Government Code, you have notified the subject GPO's, GroupOne and First Choice Cooperative, of the request for an attorney general decision. First Choice Cooperative responded to your notice by asserting that the submitted documents contain confidential and proprietary information which should be excepted from disclosure under section 552.110. Accordingly, we address First Choice Cooperative's arguments against disclosure under section 552.110. However, GroupOne has not submitted arguments for withholding or releasing the information as required under 552.305(d). Therefore, we have no basis to conclude that the responsive information pertaining to GroupOne is excepted from disclosure by section 552.110. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, we find that the district must release to the requestor responsive information pertaining to GroupOne.

You explain to this office that the district's agreement with First Choice Cooperative contains confidentiality clauses which require that certain pricing and financial information remain confidential. Please note that information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any contract between the district and First Choice Cooperative specifying otherwise.<sup>3</sup>

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>We note that section 552.022 of the Government Code expressly makes public "information in an account, voucher, or contract relating to the receipt of expenditure of public or other funds by a governmental body" unless the information is expressly made confidential by law found outside the Public Information Act. Because trade secret information is found outside the Public Information Act, we will consider the applicability of section 552.110.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>4</sup> *Id.* After reviewing First Choice Cooperative's arguments and the submitted information, we do not believe that the submitted information is a "formula, pattern, device or compilation of information" constituting a trade secret for purposes of section 552.110. Moreover, we do not believe that First Choice Cooperative has shown that *its* interest could be harmed by the release of the commercial or financial information. Therefore, we find that the district may not withhold the submitted information under section 552.110. The requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

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<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kathryn S. Knechtel  
Assistant Attorney General  
Open Records Division

KSK/ljp

Ref: ID# 133964

Encl. Submitted documents

cc: Mr. Jack H. Taylor, Jr.  
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(w/o enclosures)